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Of Jean & Eliz Hunters

5th Aug. refers the first part & remits the rest to the Ordinary

AUGUST 2d, 1766.

Unto the Right Honourable the Lords of Council and Session,

THE PETITION OF

JEAN and ELIZABETH HUNTERS, Sisters and neareſt in Kin of the now deceaſed *Andrew Hunter*, Reſidenter in *Forfar*,

Humbly ſheweth,

THAT *Andrew Hunter*, after having been ſeveral Years in the Service of the *Eaſt India Company*, returned to his native Country in the County of *Forfar*, where the moſt of his Relations reſided. That *Andrew Hunter*, at that time, had three Siſters, *Margaret Hunter*, and the two Petitioners; he took up his Reſidence in the Town of *Forfar*, with his Siſter, *Margaret*, then a Widow, and *Margaret* having predeceaſed him, he took poſſeſſion of all her Effects, although, by Law, he was intitled only to one third Share thereof, the other two Shares belonging to the Petitioners.

Mr. *Hunter*, during his Siſter *Margaret*'s Life, fell in with *Janet Brown*, and a Marriage betwixt them having been agreed to, and ſhe having nothing to contract upon her part; ſo, of this Date, a few Days before the Celebration of the Marriage, he executed the following Deed: "Know all Men "by theſe Preſents, me, *Andrew Hunter*, late of the Service "of

7 January, 1764.

" of the *East India Company*, now residing in the Town of
" *Forfar*, for pure Love, Favour and Esteem I have for *Janet*
" *Brown*, lawful Daughter of the deceased *James Brown*, some
" time Messenger in *Forfar*, *my betrothed Wife*, *and for her better*
" *living in the World after my Decease*; therefore, wit ye me
" to have sold, alienated, and disponed; likeas I, by these
" Presents, sell, alienate, and dispone from me, my Heirs,
" Executors, and Assignees, to and in favours of the said *Janet*
" *Brown*, her Heirs, Executors, or Assignees whatsoever, all
" and whole my insight Household-furniture, such as Beds,
" Tables, Chairs, Trunks, Chests, Feather-beds, Blankets,
" Sheets, and all Furniture, of whatever Name, Quality, or
" Denomination; and generally, but prejudice to the Speci-
" alty foresaid, all Gold and Silver coined and uncoined,
" Debts and Sums of Money, that shall happen to pertain
" and belong, or be addebted and resting to me at the Time
" of my Death, together with all Right, Title, Interest,
" Claim of Right, Property or Possession, I have, or can any
" way claim or pretend thereto any manner of way, reserv-
" ing my Liferent-right to the same, during all the Days of
" my Lifetime, with full Power to the said *Janet Brown*,
" immediately after my Decease, to meddle and intromit
" with the aforesaid Household-furniture, *brevi manu*, sell,
" use, and dispose upon the same at her pleasure, and to up-
" lift, call for, and pursue for the foresaid Debts and Sums
" of Money, that is due me at my Death, and to obtain De-
" crees therefor, without the Necessity of Confirmation, or
" any other Title whatsoever; Acquitances and Discharges
" to grant therefor, which shall be sufficient to the Receiv-
" ers; and generally every other Thing to do, which I
" could have done myself before granting hereof, the said
" *Janet Brown* being hereby bound, by Acceptation hereof,
" to pay my just and lawful Debts, and Funeral-charges;
" and I hereby exclude and debar all my Friends and Rela-
" tions from having any Interest in the Subjects above dis-
poned,

" poned, or troubling or moleſting the ſaid *Janet Brown* in
" the peaceable Poſſeſſion thereof; which Diſpoſition I here-
" by warrant to be good and ſufficient to her, from my own
" proper Fact and Deed, done, or to be done in Prejudice
" hereof, and conſent to the Regiſtration, *&c.*"

The Marriage was celebrated in a few Days after the Date of this Deed; and, in about eight Months thereafter, the ſame was diſſolved by Mr. *Hunter*'s Death.

Janet Brown having intromitted with the whole of her Huſband's Effects, and alſo with the Effects of *Margaret Hunter*, the Poſſeſſion of which had been aſſumed by her ſaid Brother, the Petitioners procured themſelves decerned and confirmed Executors *qua* neareſt in Kin to their ſaid deceaſed Brother and Siſter, and brought an Action againſt the ſaid *Janet Brown* before the Sheriff of *Forfar*, concluding for Delivery of the Effects which belonged to their ſaid Brother and Siſter, at the Time of their reſpective Deaths, or Value thereof.

Againſt this Action it was pled in Defence, on behalf of the Defender, that ſhe had a good Right to the whole Subjects, by the foreſaid Deed executed in her favours by her Huſband. To which it having been anſwered on the Part of the Petitioners, that the Marriage having diſſolved within Year and Day, without a Child procreate of the Marriage, the Deed could have no Effect, the Sheriff pronounced the following Interlocutor: " Having conſidered the Libel, with the Diſpo-
" ſition produced for the Defence, finds, That, beſides the
" common and proper Deſignation given *Janet Brown*, the
" Diſponee, for the gratuitous Cauſe therein mentioned, that
" the additional Appellation given her, *viz. My betrothed Wife*,
" points out clearly, that the Reaſon for granting was in
" conſideration of the intended Marriage, which being diſ-
" ſolved within Year and Day, as appears by the Certificate
" produced: Therefore ſuſtains the Purſuers Claim as ſet
" forth in the Libel, and Pleadings on their Titles, as near-

" eſt

"eſt of Kin to their deceaſed Brother the Cedent, produced, "and decerns accordingly." And upon adviſing a Reclaiming Petition, the Sheriff adhered.

Thereafter the Cauſe having been brought before your Lordſhips by Advocation, the Lord *Kennet* Ordinary, upon adviſing a Minute of Debate, of this Date, pronounced the following Interlocutor: "Having conſidered the foregoing "Debate, remits the Cauſe to the Sheriff, with this Inſtruction, that he ſuſtains the Purſuers Titles, and appoint the "Defenders to give in an Account of Charge and Diſcharge "of her Intromiſſions with her Huſband's Effects, and afterwards to proceed in the Cauſe as to him ſhall ſeem juſt." And his Lordſhip, of this Date, refuſed a Repreſentation without Anſwers.

Jan. 23, 1766.

Feb. 4, 1766.

The Defender thereupon reclaimed to your Lordſhips, who, upon adviſing Petition and Anſwers, adhered to the Lord Ordinary's Interlocutor, and refuſed the Deſire of the Petition. But, upon adviſing a ſecond Petition, with Anſwers, your Lordſhips were pleaſed, of this Date, to pronounce the following Interlocutor: "The Lords having heard this "Petition, with the Anſwers thereto, they advocate the "Cauſe, repel the Objections to the Deed in queſtion, aſſoilzie the Defender, and decern."

June 14, 1766.

July 24, 1766.

The Petitioners humbly beg leave to ſubmit this Interlocutor to your Lordſhips Review, and they are hopeful that, upon reconſidering the Caſe, your Lordſhips will ſee good Cauſe for altering the laſt Interlocutor, and recurring to the Interlocutor of the 14th *June* laſt.

Non omnium quæ a majoribus ſunt conſtituta ratio reddi poteſt, does apply to ſundry Caſes that occur in the Law.——In various Inſtances it is not eaſy to aſſign a ſatisfying Reaſon for the Law, when at the ſame time the Law is clearly fixed and eſtabliſhed.——This does remarkably apply to that Part of our

our Law, which more immediately falls under your Lordſhips Conſideration in determining the preſent Queſtion.

Where a Woman having nothing of her own is married to a Man of Rank and Fortune, it will be extremely difficult to aſſign a ſatisfactory Reaſon, why, if the Huſband ſhould die within the Year, without a living Child being procreate of the Marriage, that notwithſtanding he died in opulent Circumſtances, and a large Fortune devolved to his Heir, perhaps connected with the Defunct only in a remote Degree; that this Lady, when by the Marriage ſhe had an additional Rank and Character to ſupport, ſhould not be allowed one Sixpence out of her Huſband's Succeſſion for her Support, but ſhould be left to be ſupported by the Charity of others; and yet there can be no doubt, that, where the contrary is not provided for by the Stipulation of Parties, your Lordſhips behoved to give that Judgment, as often as the Caſe does occur.

No Point, with Submiſſion, ſeems to be more clearly eſtabliſhed in the Law, than that, where a Marriage does diſſolve within Year and Day, without a living Child being procreate of the Marriage, that the legal Proviſions do not take place, and at the ſame time all Deeds executed *intuitu matrimonii* do fall to the Ground.

All the Writers upon our Law do agree in the Principle.—The Authorities upon this Point, particularly of *Balfour*, *Spottiſwood*, Sir *Thomas Craig*, and others, were laid before your Lordſhips in the former Papers, and which therefore ſhall not be repeated. The Petitioners ſhall content themſelves with bringing again, under your Lordſhips View, the Opinion of Lord *Stair*, which he delivers in the following Words: "To come now to the Intereſts of the Huſband and "Wife, after the Diſſolution of the Marriage, we muſt di- "ſtinguiſh betwixt the Diſſolution thereof, which falls by "Death within Year and Day from the ſolemnizing of it, "and that which is diſſolved thereafter; for, by our Cu- Lib. 1 tit 4. § 19.

" ſtom, if Marriage diſſolve within Year and Day after the
" ſolemnizing thereof, all Things done in contemplation of
" the Marriage become void, and return to the Condition
" they were in before the ſame; and in this our Cuſtom
" agrees to the Civil Law, and ſo the Tocher returns back
" to the Wife, or thoſe from whom it came, and ſhe hath
" no Benefit or any Intereſt either in his Moveables or Heri-
" tage, by Law or Contract, provided to her, nor hath he any
" Intereſt in hers, unleſs there were a living Child born,
" which was heard cry or weep, in which Caſe Marriage
" hath the ſame Effect, as to all Intents and Purpoſes, as if
" it had endured beyond the Year; and this is extended to
" both the Marriage of Maids and Widows, *July* 23d, 1634,
" *Maxwell* contra *Hairſtones*, and extended alſo to an Infeft-
" ment by a Huſband to a Wife, though it had no Relation
" to the Marriage, but was only preſumed to be *hoc intuitu*,
" *November* 16th 1633, *Grant* contra *Grant*, and is not only
" extended to the Wife and Huſband, and their Heirs, but
" to any other Perſon concerned, Reſtitution being made,
" *hinc inde*, of all done *intuitu matrimonii*, *Had. June* 8th, 1610,
" Laird of *Caddel* contra *Roſs*. Yea, a Diſpoſition, by a Fa-
" ther to a Son, of his Eſtate, in contemplation of his Mar-
" riage, which was diſſolved within Year and Day, by the
" Wife's Death, was found void, ſeeing the Father perſiſted
" not therein, but infeft the ſecond Son, *July* 16th, 1678,
" Lord *Burleigh* contra Laird of *Fairnie*. And a Tocher paid
" within the Year was ordained to be repaid without any De-
" duction for the Wife's Entertainment during the Marriage,
" but only for her Cloaths, which were before the Marriage,
" and her funeral Charges, which were after the Marriage
" was diſſolved, *February* 23d, 1681, *Gordon* contra *Inglis*."

Your Lordſhips will obſerve, that it is clearly laid down by this great Lawyer, that where a Marriage diſſolves within Year and Day, and where there was no living Child born, which was heard cry or weep, that all things done *intuitu matrimonii*,

matrimonii, do become void, and that without Diſtinction whether the Deeds did flow from the Huſband or Wife, or from third Parties.

And as the Law, in this Particular, is clearly fixed and eſtabliſhed, ſo your Lordſhips have never thought yourſelves at liberty to narrow it, or to deny to it full Force and Effect, as often as Queſtions relative thereto did ariſe,—a remarkable Inſtance of which did occur not many Months ago, where a Marriage was ſolemnized, the Parties lived together for ſeveral Months, a Child was procreated of the Marriage, which was clearly proved to have been born alive, but as it was not proved to have been heard to cry, the Marks of Life and Ripeneſs which the Law, not chooſing to truſt the Conjectures of Witneſſes, hath required, your Lordſhips on that account found, that the Huſband had no Right or Title to any Part of the Wife's Tocher.

And when that is the Caſe, it is humbly ſubmitted to your Lordſhips, if the Deed now in queſtion does not fall under the ſame Predicament.—The Deed is granted by the Bridegroom to the Bride, only a few Days before the Marriage,—She is therein deſigned, his *betrothed Wife*.—It bears expreſly to be granted for her better living in the World after his Deceaſe, which is the ſtrongeſt Characteriſtick imaginable of its being a Deed *intuitu matrimonii*.—It is expreſly granted as a Fund or Proviſion for her Subſiſtance after his Death; and therefore, as the Marriage diſſolved within the Year, without a Child procreated of it, the Deed muſt be ineffectual; the implied Condition under which all Deeds of that Nature are underſtood to be granted, hath failed, and, of conſequence, it muſt fall to the Ground.

The Petitioners, with all Submiſſion, can diſcover no ſolid Grounds for differencing this Caſe from any other Marriage-ſettlement. It is of no Conſequence, nor does it affect the general Point, whether the Deed is conceived in the Form of a mutual Contract, or if it is only a monolateral Deed,

flowing

flowing from one of the Parties in favours of the other.—A mutual Contract in this Caſe was altogether unneceſſary.—The Bride had not one Shilling to give or to contract, and therefore it was only neceſſary that the Bridegroom ſhould make ſuch a Proviſion for his Wife's Subſiſtance, after his Death, as his Funds and Circumſtances could afford.—If the Wife had been poſſeſſed of Funds, and if ſhe had, a few Days before her Marriage, by a monolateral Deed, conveyed her whole Funds in favours of her promiſed Huſband, there can be no Doubt, that, if there had been no Stipulation to the contrary, the Tocher, in the Event that hath happened, would have returned to herſelf; and, if ſo, there ſeems, with Submiſſion, to be no good Reaſon why the Proviſions which, in this Caſe, were given by the Huſband to the Wife, ſhould be ſuſtained.

There is no ſolid Foundation for the Diſtinction that was made on the other Side, betwixt mutual Contracts and monolateral Deeds; as to which it was ſaid, that as the Condition did ariſe from the implied Conſent of Parties, it can only obtain in mutual Contracts, where there are *termini habiles* for ſuch Conſent.——The Petitioners apprehend, that the Condition is fixed and eſtabliſhed by the Law, and therefore, where the contrary is not provided for by the Deed itſelf, the Condition muſt be implied in every Deed of that Nature, whether it be a mutual Contract, or only granted by one of the Parties. The Law hath made no ſuch Diſtinction; and accordingly, in various Caſes, it has been found by the Court, that this reſolutive Condition is implied in monolateral Deeds, as well as in mutual Contracts, and ſo it was determined by your Lordſhips in a Cauſe extremely ſimilar to the preſent, *viz.* 16th *July* 1751, *George Bell* contra *Elizabeth Somervell*, collected by *Falconar*. The Caſe there was, *John Forreſter* returning from *Jamaica*, where he had been engaged in Trade, married *Elizabeth Somervell*, after which, he, on the Narrative, that there was no Marriage-articles executed betwixt them,

became

became bound to pay to her in Liferent, and to the Children to be procreate betwixt them in Fee, 666 *l.* 13 *s.* 4 *d.* Sterling; and failing Children, and in the Event of ſurviving him, the ſaid Sum to be intromitted with by her Heirs and Aſſignees, as ſhe ſhould think fit; and he bequeathed to her, on that Event, his whole Houſhold Pleniſhing, declaring theſe Preſents were granted by him, and accepted by her, in Satisfaction of all Claims competent to her, or her next of Kin, *diſpenſing with Delivery*, and died within the Year of the Marriage. *Elizabeth Somervell* purſued her Huſband's Executors, and *George Bell*, Merchant in *Dumfries*, Cautioner in the Confirmation, and obtained Decreet; and Mr. *Bell* having brought a Reduction, upon this Ground, that the Bond being granted *intuitu matrimonii*, it fell to the Ground, the Marriage having diſſolved within the Year. "The Lord "Ordinary found, that the Bond was granted by Mr. *For-* "*reſter* to the Defender, *intuitu* of the Marriage then ſubſiſt- "ing betwixt them; and in regard that the ſaid Marriage "diſſolved by Mr. *Forreſter*'s Death within Year and Day, "without a living Child procreate of the ſame, therefore "ſuſtained the Reaſons of Reduction, that the ſaid Bond "was thereby become void." And to this Interlocutor your Lordſhips adhered, upon adviſing two ſeparate Bills and Anſwers.

What ſeems chiefly to be inſiſted on, on the other Side, is this, that the *libera teſtandi facultas*, is not precluded between Huſband and Wife; That, as every Man may make his Latter-will in what Manner he pleaſes, ſo this Deed, not being a Deed *intuitu matrimonii*, but *mortis cauſa*, of a teſtamentary Nature, it muſt have full Effect, whether the Marriage diſſolved within the Year or not.

The Petitioners have no Occaſion to diſpute the Point in the general, that a Teſtament granted by a Huſband, in favours of his Wife, or by a Wife in favours of her Huſband, will have Effect; but they humbly apprehend, that the ſame

will not apply to the *ſpecies facti* in this Caſe.——If this Deed were to be conſidered as a Teſtament, or Settlement of Succeſſion, by the ſame Rule that it will be ſuſtained in the Event that has happened, it would, in like Manner, have fallen to be ſuſtained, even although the Marriage had never taken place, and even although it had been owing to the Fault of the Bride.

The Petitioners are humbly perſuaded, that, ſuppoſing this Woman had broke off the Marriage, it would be difficult to ſatisfy your Lordſhips, that ſhe notwithſtanding would be intitled in conſequence of this Deed, to have carried off the whole of Mr. *Hunter*'s Effects, to the Prejudice of his neareſt Relations.—The Petitioners apprehend, that, although every Perſon who is not otherways tied up, is at full Liberty to diſpoſe of his Effects at pleaſure, yet it will not be preſumed, that any Man will give to a Stranger the whole of his Effects to the Prejudice of his near Relations, unleſs he has expreſly ſaid ſo; and that your Lordſhips will not incline to put ſuch a Conſtruction upon any Deed he may have executed, where it will admit of another Conſtruction.—The Petitioners, in this caſe, do humbly contend, that the Deed in queſtion is not a teſtamentary Deed, but that the Deed itſelf, and the Circumſtances under which it was granted, do clearly point it out to be a Deed granted *intuitu matrimonii*, then under the View of Parties.——The Deed is granted only a few Days before the Celebration of the Marriage; ſhe is therein deſigned his *betrothed Wife*; and it bears to be granted for the ſpecial Purpoſe of her better living in the World after his Deceaſe. The Deed accordingly has none of the Characteriſticks of a Latter-will; it contains Warrandice from the Fact and Deed of the Granter; it contains no power of Alteration; and as it contains no Clauſe diſpenſing with the Not-delivery, and was not found in the Repoſitories of the Huſband after his Death, nor was ſeen by the Petitioners till produced in this Proceſs. The Preſumption of Law is, that it was delivered to the Defender, or ſome Perſon

Perſon for her Behoof; that it was a Deed irrevokable thereafter by the Huſband, which is altogether inconſiſtent with the Idea of a teſtamentary Settlement.—The foreſaid Circumſtances do clearly point out, that this was a Deed granted *intuitu matrimonii*, for the ſpecial Purpoſe, (as is ſet forth in the Deed itſelf) of being a Proviſion to his Wife after his Death; that therefore it cannot be preſumed, that it was ever the Meaning of the Defunct; that this Deed was to take effect if the Marriage had not taken place; and, as the Non-exiſtence of the Marriage, and its diſſolving within Year and Day without a living Child, are in this Queſtion conſidered in the Law in the ſame Light; ſo the Petitioners humbly apprehend, that this Deed, in the Event that has happened, can have no Effect.—Every Man is preſumed, *præſumptione juris et de jure*, to know the Law, and, particularly, the Law regulating the Deeds which he executes; and therefore, if Mr. *Hunter* had intended that this Deed was to be an effectual Deed in favours of the Defender, whether the Marriage diſſolved within Year and Day or not, it muſt be preſumed, that he would have ſo provided in the Deed itſelf.

It was ſaid for the Defender, that, when the Circumſtances of the Parties, at the Time of entering into the Marriage, are conſidered, particularly, that Mr. *Hunter*'s Conſtitution was much impaired, and the Defender pretty far advanced in Years, it will by no means appear probable, that this Marriage was contracted with the common View of having Children, but that they might live together in ſtrict Friendſhip without being expoſed to the malicious Tongue of Slander; ſo that the Deed on that account cannot be ſaid to have been granted in contemplation of the Marriage, but that both the Deed and the Marriage aroſe from the ſame Source.

The Petitioners muſt confeſs, that they do not perfectly underſtand the Import of this Argument. It is not the Petitioners Buſineſs to enquire into what might have been the View of Parties in entering into this Marriage. It occurs

to

to the Petitioners, that no rational Motives can be assigned for entering into this Marriage, and which is a good Reason, why no Encouragement should be given to Matches of that Kind, and must put the Defender's Claim in an unfavourable Light; but whatever might have been the Views of Parties, it appears clear from the Deed itself, and the Circumstances under which it was granted, that the Indendment of the Deed was a Provision to the Wife, in the Event of her surviving the Husband; in which View, it is plainly a Deed *intuitu matrimonii*, and must, therefore, fall under the foresaid general Rule, that if the Marriage did dissolve within the Year, without a living Child, it was to have no Effect; and, this being the Case, the Husband's bad State of Health, at the Time of entering into the Marriage, is a Circumstance against the Defender; for if he had only a Prospect of living a short Time, and if he in all Events intended, that his Wife was to take under the foresaid Deed, he certainly would have insert the common saving Clause, that the Deed should be effectual, even although the Marriage should dissolve within the Year. In the Decision above mentioned, *Bell contra Somervell*, the Husband's State of Health was founded upon, in order to show, that it could only have been intended as a *mortis causa* Deed. But the Court justly paid no regard to the Allegation, for as the Deed appeared to have been granted *intuitu matrimonii*, and as the Granter did not provide by the Deed, against the Event of the Marriage dissolving within the Year, so, whatever the Granter's Intentions might have been, the Court did not think themselves at Liberty to supply the foresaid Defect.

The Petitioners must further observe, that the foresaid Interlocutor will at any Rate fall to be varied, in so far as concerns the Effects of *Margaret Hunter*, their deceased Sister, which were intromitted with *per aversionem* by their Brother after her Death, and which, in consequence of the foresaid

Deed,

Deed, have been intromitted with by the Defender along with the Effects of her Husband.

As no Settlement was executed by *Margaret Hunter*, it is extremely obvious, that any Effects she left, would belong equally to her Brother and the Petitioners, and as the Brother intromitted with the whole, he and his Representatives must be liable to account to the Petitioners for two Thirds thereof.

The only Answer that has been made to this is, that the Brother had a Right to *Margaret Hunter's* Effects by a nuncupative Testament; but as it is quite unknown to the Petitioners, that any such Thing ever existed, so there is not the least Evidence of the Fact, and although it were proved, it could never go further than to the Extent of 100 *l. Scots.*

May it therefore please your Lordships, to alter the foresaid Interlocutor, and to find, that the Marriage betwixt the Defender and Andrew Hunter, *having dissolved within the Year without a living Child; that the foresaid Deed did thereby become ineffectual, and that therefore, the Defender is accountable for the Effects of her deceased Husband, which were intromitted with by her. At any rate,* 2do, *to find, that she is accountable for two Thirds of the Effects of the deceased* Margaret Hunter, *the Petitioners Sister, and which were intromitted with by the Defender's Husband.*

According to Justice, &c.

ROB. MACQUEEN.